No. 94-1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF *AMICUS CURIAE* OF MARCI A. HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF PETITIONER

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PERMISSION TO FILE BRIEF AS AMICI CURIAE

Professors Marci A. Hamilton and David Schoenbrod file this brief as *amici curiae* on behalf of the Petitioner, pursuant to Rule 37.3, accompanied by a letter of the Petitioner, dated October 24, 1995, and a letter of the Respondent, dated October 30, 1995, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief.

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BRIEF *AMICUS CURIAE* OF MARCI A. HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

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Press, 1993) and is co-author of *Remedies: Public and Private* (West Pub., 1990).[1]

We submit this brief in the hope that what we have learned from our study of the delegation of legislative power may assist the Court in addressing the question whether Congress constitutionally delegated to the President the power to make the death penalty law under which Dwight Loving was sentenced to death.

SUMMARY OF ARGUMENT

The requirement in Article I of the Constitution that Congress take responsibility for making national policy decisions serves the ends of democratic accountability and liberty. Under any reasonable interpretation of Article I, Congress's failure to embrace its constitutional responsibilities to determine aggravating factors in military death penalty cases is unconstitutional, undermines accountability, and infringes upon liberty.

The nondelegation doctrine requires the Court only to demarcate the boundaries of Article I power. How that power is exercised within those boundaries remains the province of the Congress. There is no practical or political impediment to Congress bringing its legislative practices into line with Article I.

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[1] The views expressed in this brief are those of Marci A. Hamilton and David Schoenbrod and do not represent the views of the institutions with which they are affiliated.

Congress's passive and inferred acquiescence to the President's ad hoc determination of aggravating factors in military death penalty proceedings does not satisfy any of the nondelegation standards the Court has articulated. If Congress is to bring its practices into line with Article I, however, a clearer statement of Article I's limits is required. We urge the Court to return to its original understanding of the nondelegation principle.

ARGUMENT

I. DELEGATION OF THE POWER TO DETERMINE AGGRAVATING FACTORS IS INCONSISTENT WITH THE PURPOSES OF THE NONDELEGATION DOCTRINE

The Constitution reposes lawmaking responsibility in the legislative branch and places limits on the power of Congress to delegate its responsibility to make the law. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892); *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decisionmaking responsibility of legislators). Thus, the question is not whether, but rather to what extent, Article I prohibits Congress from delegating legislative power. Although conceptions of that limit vary, under any reasonable conception, that limit is exceeded in this case.

The nondelegation doctrine has two purposes: democratic accountability and the protection of liberty. *See Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., concurring). (1963). By ensuring that the lawmaking power reposed in the people's elected representatives remains with the legislature, the nondelegation doctrine fosters democratic accountability. *E.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406-07 (1928). Article I grants Congress broad power to make national policy precisely because it is the most accountable branch.

The Framers believed that requiring the laws to be enacted by majorities in a bicameral legislature and then presented to the president would discourage those intrusions on liberty that lack broad public support. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Federalist No.* 73 at 494-95 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). This means of protecting liberty antedates, undergirds, and compliments the protection of rights later enumerated in the Bill of Rights. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* at 28-31 (1993); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 Ga. L. Rev. 81, 86-90 (1994).

Both of these purposes to establish democratic accountability and to protect liberty are undercut when Congress does not take affirmative responsibility for the laws. Legislators escape accountability for the law at the next election and impositions on liberty do not have to garner sufficient popular support to get through the Article I legislative process.

In this case, Congress neither stated the governing law nor stated the principles that the President should follow in making it. Indeed, Congress at most *implicitly* delegated the power to make the law. In other words, before the President made the death penalty law, Congress took no responsibility for it. After the President made the law, a congressional conference report disclaimed any intention of changing what *he* had done, thereby washing its hands of the matter. H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1985 U.S.C.C.A.N. 571, 579. At most, Congress passively acquiesced in the President's death penalty law. Congress's failure to object to executive action does not amount to the affirmative taking of responsibility needed to serve the purposes of the nondelegation doctrine. *See* Schoenbrod *supra*, at chs. 6, 7. So, in contrast to the requirement of Article I that the House, the Senate, and the President take responsibility for legislative acts (unless, of course, the President vetoes the act and the House and Senate override the veto), it was the President alone who took responsibility for the death penalty law under which Dwight Loving was sentenced.

II. THE COURT SHOULD CALL UPON CONGRESS TO HELP DETERMINE HOW BEST TO BRING ITS LEGISLATIVE PRACTICE IN LINE WITH ARTICLE I

The Court could decide this case by holding that those faced with the death penalty have a special right under the Fifth and Eighth Amendments for the legislature to make the death penalty law. *Furman v. Georgia*, 408 U.S. 238, 256 (Douglas, J., concurring), 283-84 (Brennan, J., concurring) (1972); *Gregg v. Georgia*, 428 U.S. 153, 174-76 (1976); *see also Zant v. Stephens*, 462 U.S. 862, 877 (1983) (upholding statutory

aggravating circumstances as adequately narrowing expanse of death penalty). In a federal system, the narrower ground, however, is that Congress's failure to make the death penalty law conflicts with Article I's assignment to it of the legislative power. That the delegation issue is the narrower ground follows from *Plaut v. Spendthrift Farm, Inc.*,___ U.S. ___, 115 S.Ct. 1447, 1452 (1995):

> Respondents submit that § 27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment. Because the latter submission, if correct, might dictate a similar result in a challenge to state legislation under the Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first.

Id. (footnote omitted) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Whether the Court finds that the statute in this case delegates unconstitutionally or interprets it to avoid this constitutional issue, the Court faces the task in this case of clarifying the test for unconstitutional delegation. That task is a difficult one because any test that fully serves the purposes of Article I conflicts with much modern legislative practice.

Fortunately, however, the burden of upholding the Constitution is not the Court's alone. As Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*, ____ U.S. ____, 115 S.Ct. 1624, 1639 (1995):

> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

Lopez signals the Court's increasing readiness to provide meaningful boundaries to the limited powers accorded Congress in Article I. Clarifying the nondelegation doctrine is another part of that project. Similarly, courts in other contexts have called upon the political branches to help solve constitutional problems. *E.g.*, *Virginia v. West Virginia*, 246 U.S. 565, 605 (1918) (calling upon Congress to legislate a solution to an interstate impasse); *McDuffy v. Secretary of [the] Executive Office of Education*, 415 Mass. 545, 620-21, 615 N.E.2d 516, 555-56 (1993) (asking legislators and executives of the Commonwealth and its local governments, who had violated a state constitutional requirement, to provide an adequate

education to define the precise nature of the task which they face in fulfilling their constitutional duty).[2]

We urge the Court to decide that the supposed delegation in this case cannot stand under any conceivable test of delegation and call upon Congress to bring legislative practice in line with Article I. Enforcing Article I's prohibition on delegation raises the reasonable concern that the Court will be placing difficult burdens on Congress. Clarifying and strengthening the nondelegation doctrine, however, does not place impossible burdens upon Congress. Nor does it require the Court to be the sole branch to identify and redress the problems resulting from too much delegation for too long. Congress can straightforwardly and legitimately repair violations of the nondelegation doctrine through the legislative process. One sensible approach among others that Congress could take is described in an article by now-Justice Breyer in which he suggested that Congress could respond to the decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), by enacting a statute requiring that agency

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[2] Paul R. Dimond, Brown *and the Transformation of the Constitution: Concluding Remarks*, 61 Fordham L.Rev. 63, 65-66 (1992) states:

> We should concede that the more massive and entrenched the wrong of discrimination, the more important it is for the courts to declare the full extent of that wrong. The courts must also permit the ultimate remedy to be worked out in a political process in which those who are aggrieved will at least have a continuing claim that the declared wrong cannot be remedied in the courts alone.

Id. (footnote omitted).

regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen Breyer, *The Legislative Veto After* Chadha, 72 Geo. L. Rev. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations.

It is not politically impossible for Congress to meet the demands of the nondelegation doctrine. Not only do practical legislative mechanisms exist to cure the delegation problem, but, in addition, public opinion is calling for a more accountable government. In response, promises are being made to "restore accountability to Congress." "Contract with America" (1994). Members of the House from both parties have formed a Constitutional Caucus to ensure that Congress considers it constitutional duties in the legislative process. Other members of Congress undoubtedly take seriously their oaths to uphold the Constitution.

If the Court were to hold that Congress's passive refusal to take responsibility for the death penalty law in this case violates Article I, it would not be required to embrace any particular legislative approach or any one faction in the already initiated debate over how to make government more accountable. Rather, the Court's role would be limited to its appointed one of identifying constitutional boundaries.

III. THE NONDELEGATION DOCTRINE

From the earliest days of the Constitution, there is ample evidence that both the Framers and this Court believed that representatives should be required to make the hard policy choices and that the Court took the nondelegation doctrine

seriously. *See* Schoenbrod *supra*, at 30-34 (collecting examples from 18th and 19th centuries). In the twentieth century, three cases invalidated statutes on delegation grounds prior to the New Deal: *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts . . . ."). *Id.* at 86-87. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states). These cases were followed by the two most well-known nondelegation cases, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432-33 (1935), which struck down New Deal legislation by votes of 8-1 and 9-0, respectively.

Many cases since the New Deal have invalidated executive lawmaking. For example,

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), struck down a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *Id.* at 122 (Rehnquist, J., dissenting).
- *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) struck down hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *Id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make the law. *E.g.*, *Smith v. Goguen*, 415 U.S. 566, 575 (1974).[3]
- Various cases have struck down city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, American Constitutional Law §§12-38 (2d ed. 1988).
- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *E.g.*, *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 611-12 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

Even though the Court has voided laws made by the executive in a significant number of cases, it has not landed upon a single coherent test to guide Congress and the executive in their future dealings. The present state of the case law is unsatisfactory for two reasons.

First, it is internally inconsistent. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is internally contradictory. *See e.g.*, *Smith v. Goguen*, 415 U.S. 566, 591-604 (1974) (Rehnquist, J.,

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[3] The void for vagueness doctrine applies to civil as well as criminal offenses, *Jordan v. De George*, 341 U.S. 223, 231, *reh'g denied* 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 112 (1976) (Rehnquist, J., dissenting); *American Petroleum Institute*, 448 U.S. at 717-18 n.30 (Marshall, J., joined by Brennan, White, and Blackmun, J.J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., joined by Brennan, J., dissenting); *Chada*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod *supra*, at 40-45, 181. This case offers the Court the opportunity to provide clearer guidance on the constitutional principles that should guide Congress in its dealings with the executive branch.

Second, what the preceding listing of cases does not reveal is that the Court has also affirmed delegations in which Congress had not made the hard choices. *E.g.*, *Mistretta*, 488 U.S. at 422 (Scalia J., dissenting); United States v. Rock Royal Cooperative, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). .

Because of the Court's generally inconsistent application of the nondelegation principle, Congress and the President have not received a very clear picture of their responsibility under the Constitution. When the Court has struck legislative delegations, the existing jurisprudence has left it open to the charge that it meddles in policy. When the Court has affirmed delegations in which Congress has not made the hard choices, it has tended to legitimate legislative practices that undermine democratic accountability and liberty.

These consequences flow from the Court's departure from the limits on delegation originally conceived by the Framers and enunciated in early Supreme Court cases. The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress . . . ." U.S. Const. art. I, § 1. The legislative power is to make rules of private conduct, as

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.), made clear: "[it] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136; *see also Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S.Ct. 1447, 1455 (1995); Schoenbrod *supra* at 30-31, 156-57. An invigorated nondelegation doctrine means that, subject to the other constraints of the Constitution, Congress alone may make the rules that govern private persons and states. Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod *supra*, at ch. 12 (discussing the application of this test). Such a test of unconstitutional delegation is consistent with the purpose of Article I. Branches other than the legislative will face hard decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion; but it is the legislators who will have to face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits of its actions. *See generally* Schoenbrod *supra*, at 183-84.

Unfortunately, the Court began to move away from this original understanding of Article I during the Progressive era, with its now discredited faith that expert agencies could disinterestedly and dispassionately provide scientific answers to public policy disputes. Schoenbrod *supra*, at 31-36. The new test of unconstitutional delegation required that the Congress provide an "intelligible principle" to agency lawmakers. *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). At points, the Court hinted that an "intelligible principle" is a

rule of conduct, *Yakus v. United States*, 321 U.S. 414, 424-25 (1944); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), but generally it meant that Congress need only state its goals. *E.g.*, *Mistretta*, 488 U.S. at 372-73; *Rock Royal Cooperative*, 307 U.S. at 574. Congress, following the path of least political resistance, came to state as its goals only the popular goals of the regulatory program that it was launching, leaving it to the agencies to deal with the conflicts between those goals and the costs of achieving them. In sum, the Court's intelligible principle test has come to mean that Congress is too often tempted to take the credit for the popular and shift to the agency the blame for the unpopular. Schoenbrod *supra*, at chs. 5, 8. In the course of judicial review of agency choices, the courts as well as agencies have been drawn into making the legislative choices that Congress is required to take under Article I. Antonin Scalia, *A Note on the* Benzene *Case*, 4 Reg. 25, 28 (July-Aug. 1980); Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).

Although the intelligibile principle rule surely invalidates Congress's abdication of responsibility in this case, it has failed to hold the line on Congress's natural temptation to avoid difficult policy choices. This case provides the Court an opportunity to identify a particularly egregious congressional delegation and to send a message to Congress that Article I forbids delegating the power to make the laws that govern society.

CONCLUSION

The post-New Deal Court is rightly reluctant to interfere with legislative outcomes and especially social policy choices. There should be no similar reluctance to call upon *Congress* to make the policy choices entrusted to it by Article I. Accordingly, we urge the Court to hold that Congress's failure to embrace its responsibility to set out the aggravating factors for military death penalty determinations invalidates the death penalty standards promulgated by the President.

Respectfully submitted,

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